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# TESTING AN ECONOMIC THEORY OF COPYRIGHT: HISTORICAL MATERIALS AND FAIR USE<sup>†</sup>

FRANK P. DARR\*

## INTRODUCTION

In copyright law, the doctrine of fair use permits a copier to use some portion of a protected writing without securing the permission of the copyright holder.<sup>1</sup> Without that protection, the copier is an infringer and subject to potentially significant liability for violating the rights of the copyright holder.<sup>2</sup> One purpose of fair use is essentially utilitarian, the creation of new works of independent significance.<sup>3</sup> Teachers, for example, rely on the doctrine when

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<sup>1</sup> See Copyright Act of 1976, § 107, 17 U.S.C. § 107 (1988). For the text of this section, see *infra* note 30.

<sup>2</sup> The Copyright Act provides that an author or other holder of a copyright may recover for a copyright infringement by bringing suit. In essence, a claim for infringement consists of showing that the claimant has a valid copyright and that the infringer has copied the protected material. F. COOPER, LAW AND THE SOFTWARE MARKETER 65 (1988). Illegal copying may include the use of original material in a translation, abridgement or condensation of an original work. *Id.* at 69. Anyone who copies or distributes copies of a copyrighted work without the permission of the holder is an infringer. 17 U.S.C. § 501(a).

Remedies under the Copyright Act are extensive. The infringer may be liable for actual damages and profits or, alternatively, statutory damages of \$500 to \$20,000 for each infringement. *Id.* § 504. In a willful violation of copyright law, damages can be increased to \$100,000 for an infringement. *Id.* § 504(c). Furthermore, authors who deposit the material with the Library of Congress and follow the other requirements for registration can recover costs and attorneys' fees. *Id.* § 505. Additional remedies include the issuance of an injunction to prevent infringement and the impoundment and destruction of improper copies. *Id.* §§ 502-503.

<sup>3</sup> See W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 3 (1985). Patry describes the development of the basis for fair use:

English judges were quite explicit in articulating their rationale for permitting the unconsented use of one author's work by a subsequent author. That rationale, found initially in the "fair abridgement" context, was that the second author, through a good faith productive use of the first author's work, had, in effect, created a new, original work which would itself promote the progress of science and thereby benefit the public.

*Id.*

preparing course material containing copyrighted text.<sup>4</sup> Likewise, scholars rely on the privilege when creating biographical and historical works.<sup>5</sup> Historians and critics, for example, have looked to the unpublished writings of their subjects to add depth to their work.<sup>6</sup> In this regard, the use of unpublished writings appears particularly consistent with the utilitarian purpose of the fair use privilege.<sup>7</sup>

The broad protection afforded unpublished writings by the courts, however, does not conform to the utilitarian purpose of fair use. Despite the obvious importance of unpublished letters, diaries and manuscripts, Supreme Court and Second Circuit decisions have reduced fair use protection for authors copying from such sources.<sup>8</sup> Because these decisions do not fit within an understanding of fair use based on utilitarian notions, they have provoked extensive debate within the legal community about the application of fair use to unpublished writings.<sup>9</sup>

<sup>4</sup> H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66-67 (1976). When the issue has been litigated, however, a court seldom has approved academic copying. See W. PATRY, *supra* note 3, at 177-90.

<sup>5</sup> See, e.g., W. PATRY, *supra* note 3, at 65-91; Benedict, *Historians and the Continuing Controversy over Fair Use of Unpublished Manuscripts*, 91 AM. HIST. REV. 859, 863 (1986).

<sup>6</sup> See ZINSSER, *EXTRAORDINARY LIVES: THE ART AND CRAFT OF AMERICAN BIOGRAPHY* 11-14 (1985) (part of the craft of good biography is the use of personal writings, such as letters and diaries, to understand better the subject's motivations).

<sup>7</sup> This argument is premised on the constitutional provision that permits Congress to enact copyright law. The Constitution provides that Congress may enact these statutes "to Promote the Progress of Science and useful Arts." U.S. CONST. art. 1, § 8. For a discussion of the utilitarian rationale of copyright, see Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107-10 (1990). For a critique of the narrowness of the utilitarian approach, see Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1140 (1990), and Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 539-46 (1990).

<sup>8</sup> See *Harper and Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1985); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987); *Wright v. Warner Books, Inc.*, 748 F. Supp. 105 (S.D.N.Y. 1990); *Love v. Kwitny*, 706 F. Supp. 1123 (S.D.N.Y. 1990); *New Era Publications Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir.), *rehearing en banc denied*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990).

<sup>9</sup> The opinions in these cases suggest some of the philosophical problems with which the courts are dealing. Compare the majority and minority decisions in *Harper and Row, Publishers v. Nation Enters.*, 471 U.S. 539 (1986) and *New Era Publications Int'l v. Henry Holt & Co.*, 884 F.2d 659 (2d Cir. 1989). The debate has entered the legal literature as Second Circuit judges have debated one another about the appropriate standards for fair use of unpublished materials. See Newman, *Copyright Law and the Protection of Privacy*, 12 COLUM. J.L. & ARTS 459 (1988); Newman, *Not the End of History: The Second Circuit Struggles with Fair Use*, 37 J. COPYRIGHT SOC'Y 12 (1989); Miner, *Exploiting Stolen Text: Fair Use or Foul Play*, 37 J. COPYRIGHT SOC'Y 1 (1989). Judge Leval, the district court judge in *Salinger and New Era*, has also entered the fray and drawn a rebuttal. See Leval, *supra* note 7; Weinreb,

The conflict that these recent decisions have caused also raises significant questions about copyright and fair use for academic consideration.<sup>10</sup> To resolve the conflict, many writers suggest courts should use an economic theory of wealth maximization to set boundaries for copyright protection.<sup>11</sup> Because of the uncertainty historically surrounding fair use,<sup>12</sup> few have made the claim that the courts already decide cases in a way that applies the utilitarian approach. In contrast, Professor Landes and Judge Posner argue that the methods of law and economics already describe the results of fair use cases in terms of wealth maximization.<sup>13</sup> That argument is doubtful, however, when the theory is applied to the cases extending copyright protection to unpublished writings.

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*supra* note 7. See generally Abrams, *First Amendment and Copyright: the Seventeenth Donald C. Brace Memorial Lecture*, 35 J. COPYRIGHT SOC'Y 1 (1987); Conley, *Author, User, Scholar, Thief: Fair Use and Unpublished Works*, 9 CARDOZO ARTS & ENT. L.J. 15 (1990); Note, *The Chilling Effect of Overprotecting Factual Narrative Works*, 11 HASTINGS COMM. & ENT. L.J. 75 (1988); Note, *Should Copyright Law Make Unpublished Works Unfair Game?*, 51 OHIO ST. L.J. 1399 (1990); Note, *Salinger v. Random House: A Biographer's Dilemma*, 34 ST. LOUIS U.L.J. 149 (1989); Perry, *What Publishers Call Quoting, Computer Industry Calls Piracy as Industries Face Off on Capitol Hill*, Wall St. J., April 23, 1991, at A22, col. 1.

<sup>10</sup> For a broadly researched review of the area, see Bilder, *The Shrinking Back: The Law of Biography*, 43 STAN. L. REV. 299 (1991).

<sup>11</sup> See, e.g., Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982) (fair use permits uncompensated transfers that are socially desirable but not possible within the market); Landes and Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989). For a comparison of the economic justifications for patent and copyright, see R. BENKO, *PROTECTING INTELLECTUAL PROPERTY RIGHTS: ISSUES AND CONTROVERSIES* 21-24 (1987). Others have used a law and economics approach to question more generally the need for extensive copyright protection. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 291-323 (1970). The legal literature, however, is not uniform in its treatment. Harvard's Professor Fisher, for example, finds a law and economics model incomplete and offers a more complicated value-based system for appraising fair use questions. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); see also Dratler, *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233 (1988) (urging faithfulness to the elements found in section 107 of the Act).

<sup>12</sup> Justice Story described the problem with fair use in terms that remain relevant: "Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussion, to what may be called the metaphysics of the law, where distinctions are, or at least may be, very subtle and refined, and sometimes, almost evanescent." *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901). This conclusion is borne out in the interpretation of the four factors listed in the Copyright Act of 1976, 17 U.S.C. §§ 101-914, for determining whether a use is fair. See *infra* note 33.

<sup>13</sup> Landes and Posner, *supra* note 11, at 357. The suggestion that utilitarianism and wealth maximization are the same will likely provoke disagreement from advocates of law and economics. See, e.g., Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). This article does not attack the general assumptions of either approach, so the debate is irrelevant to the conclusions suggested here.

The Landes and Posner model of copyright suggests three factors critical to deciding whether a particular use is fair. First, fair use should favor productive uses.<sup>14</sup> Second, fair use should apply when the author's incentive to draft an original writing was not economic.<sup>15</sup> Third, fair use should permit the use of limited portions of an unpublished writing.<sup>16</sup> Though this model would generally favor limited fair use protection for unpublished writings, the five federal decisions concerning unpublished writings do not consistently follow the model's predictions.<sup>17</sup>

Several reasons may explain the judicial departure from the Landes and Posner model. First, it may be impossible to use the model. The informational problems it presents would preclude the most diligent of judges from trying to apply it.<sup>18</sup> This explanation, however, ignores the courts' ability to adopt second-best rules as proxies for complete information.<sup>19</sup> Second, the case outcomes may diverge from the model because the model results in indeterminate solutions. Either there is no one right answer, or the right answer keeps changing.<sup>20</sup> If the courts are using a model that is itself indeterminate, the inconsistent decisions could reflect that problem.<sup>21</sup> The problem of indeterminacy, however, should not affect contemporaneously decided cases.<sup>22</sup> Moreover, the critique of indeterminacy, like the one of informational limits, is essentially normative; it suggests why courts should not use the economic model but does not address the question of whether they do use it despite its normative flaws.<sup>23</sup>

A more likely conclusion is that judges decide cases using a more complicated set of values than the economic "determinism" that Landes and Posner suggest.<sup>24</sup> Because the results of the cases do not conform particularly well with the expected results from the economic model, one should consider the possibility that judges decide cases for the reasons they list in their decisions. If that is so, then any attempt to construct a theory of decision-making in fair

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<sup>14</sup> See *infra* notes 73-74 and accompanying text.

<sup>15</sup> See *infra* notes 75-76 and accompanying text.

<sup>16</sup> See *infra* text accompanying note 77.

<sup>17</sup> See *infra* text accompanying notes 78-120.

<sup>18</sup> See *infra* text accompanying notes 121-24.

<sup>19</sup> *Id.*

<sup>20</sup> See *infra* text accompanying notes 125-28.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See *infra* text accompanying notes 129-39.

use cases should consider the literature that attempts to interpret the reasoning judges use and incorporate it as an explicit part of the model.

This article explores the problem in four sections. Part I provides a general description of copyright law and the fair use defense. Part II describes the Landes and Posner model. Part III predicts the outcome of cases involving unpublished writings based on second-best rules consistent with the Landes and Posner model and presents the sample of reported cases involving unpublished writings. This section demonstrates that the economic model fails to account for the results of these cases. Part IV analyzes the normative criticisms of the economic model and suggests that they do not address the positive claim made by the law and economics approach to copyright. It then offers some reasons for that failure that suggest judges hold a more complicated normative view of copyright law than the academic model suggests.

### I. COPYRIGHT PROTECTION AND FAIR USE

Title 17 of the United States Code contains the Copyright Act of 1976.<sup>25</sup> Section 102 of the Act authorizes copyright protection for original works of authorship.<sup>26</sup> Coverage extends to any literary work, which the law defines as the expression of an idea in a particular form.<sup>27</sup> If the author of an original work can claim a valid copyright, the author receives a bundle of rights in the particular form of the expression. These rights permit the author to control display and reproduction of the material, and the creation of derivative works (e.g. movies from books).<sup>28</sup> These rights subsist from the time of the creation of the work for a term of the life of the author plus fifty years.<sup>29</sup>

Authors, however, retain only partial control of original writings. Importantly, section 107 codifies the fair use doctrine.<sup>30</sup> The

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<sup>25</sup> 17 U.S.C. §§ 101-914 (1988).

<sup>26</sup> *Id.* § 102.

<sup>27</sup> *Id.* § 101. The law does not protect the underlying idea, only the particular expression of the idea. *Id.* § 102(b).

<sup>28</sup> *Id.* § 106

<sup>29</sup> *Id.* § 302(a). Works for hire have copyright protection for seventy-five years from publication or one hundred years from creation, whichever is less. *Id.* § 302(c).

<sup>30</sup> See 17 U.S.C. § 107 (1988). Section 107 provides:

Notwithstanding the provisions of section 106 [concerning the rights of the author], the fair use of a copyrighted work, including such use by reproduction in copies . . . or other means specified in that section, for purposes of . . .

statute sets out two general requirements for the application of the fair use defense. First, the use must be for one of the enumerated purposes such as teaching, scholarship or research. Second, the use must be fair, based on a balancing of the purpose of the copying, the nature of the copied work, the amount and quality of the amount copied and the effect of the copying on the market for the original work.<sup>31</sup>

Despite codification of the fair use doctrine, the statute provides little guidance for specific cases. As the legislative history of the section suggests, "no real definition of the concept [of fair use] has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."<sup>32</sup> The cases bear out the view that many factors affect the doctrine's application.<sup>33</sup> As Professor Nimmer concludes, "[w]hat facts will be suffi-

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teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

*Id.* The Copyright Act provides exceptions for libraries, cable transmission and music. *Id.* §§ 108, 111, 115.

<sup>31</sup> *Id.* § 107.

<sup>32</sup> H. Rep. No. 1476, 94th Cong., 2d Sess. 65 (1976). *But see* W. PATRY, *supra* note 3, at 4–5 (questioning the historical sources of the fair use privilege).

<sup>33</sup> The first factor section 107 directs the courts to consider is the character of the use. 17 U.S.C. § 107(1). The statute specifically favors some uses, such as nonprofit educational uses. On the other hand, there is no safe harbor for such a use, according to the legislative history of the section. *See* W. PATRY, *supra* note 3, at 368–69. The cases lead to some curious distinctions. As one writer on the subject explained, "A use whose 'character' is commercial may nevertheless have a 'purpose' of a type qualifying for fair use, e.g., criticism or comment. Under these circumstances a proper 'purpose' may rebut an otherwise unacceptable commercial 'character.'" *Id.* at 367. Importantly, "while the 'nature' of an entity may be nonprofit or noncommercial, a particular use it makes of copyrighted material may be 'commercial' in character." *Id.* at 370. In short, even seemingly protected academic copying may take on a commercial character in the eyes of the courts.

The second factor is the nature of the copyrighted work. 17 U.S.C. § 107(2). In this regard, the division is usually between creative and informational materials. The more creative the work, the less likely copyright protection will be mitigated.

The third factor is the amount and substantiality of the portion used. *Id.* § 107(3). The greater the amount copied, the less likely the copying will be a fair use. Furthermore, courts judge the qualities of the copied materials. The more the copying appropriates the commercial value of the piece, the less likely fair use applies. *See* W. PATRY, *supra* note 3, at 449–52.

Finally, section 107 requires the court to consider the commercial impact of the use. 17 U.S.C. § 107(4). The United States Supreme Court has adopted two standards for reviewing

cient to raise this defense in any case is not easily answered."<sup>34</sup> Venturing where others might fear, Landes and Posner offer a law and economics approach to interpret the application of the fair use privilege.

## II. THE ECONOMIC ANALYSIS OF COPYRIGHT LAW

Like the economic explanation of common law,<sup>35</sup> an economic theory of copyright purports to be an explanation of what judges do in interpreting the Copyright Act.<sup>36</sup> In this sense, it is a positive theory attempting to describe how results are reached rather than a normative theory suggesting the goals copyright should seek to achieve.<sup>37</sup> As an application of economic theory, the economic analysis of copyright attempts to explain "to what extent copyright law can be explained as a means for promoting efficient allocation of resources."<sup>38</sup>

Landes and Posner suggest that an economic theory of copyright would recognize both the benefits and costs of a system that provides a property right in a writing. It then would balance the costs of enforcement and limiting access to the work against the benefits of providing incentives to create.<sup>39</sup> They explain the balance that must be struck for a copyright system to promote the greatest social welfare. First, the system must provide an incentive for an author to create. Under an efficient system, an author must have the opportunity to recover the costs of writing.<sup>40</sup> The costs the writer must recover include both a fixed cost of creation, *i.e.*, writing and

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the impact of copying. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984). If the copying is for commercial use, there is a presumption of injury to the value of the copyright. *Id.* On the other hand, the owner of the copyright must show by a preponderance of the evidence that a noncommercial use is likely to be harmful. *Id.* In any case, the evidence of commercial harm will center on a finding that the copy in some way usurps the existing or potential commercial market for the original work. See W. PATRY, *supra* note 3, at 455-58. If the plaintiff fails to show that he will suffer an injury from the commercial use of copyrighted material, the defendant may defeat an infringement claim. In *Consumers Union of the United States v. General Signal Corp.*, for example, a vacuum cleaner manufacturer that quoted a favorable report in *Consumer Reports* for its product defeated an infringement claim on the basis that the use of the material did not affect the plaintiff's future sales. 724 F.2d 1044, 1050-51 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984).

<sup>34</sup> 3 NIMMER ON COPYRIGHT § 13.05 at 13-63 (1990).

<sup>35</sup> See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 21 (3d ed. 1986).

<sup>36</sup> Landes and Posner, *supra* note 11, at 325.

<sup>37</sup> R. POSNER, *supra* note 35, at 21.

<sup>38</sup> Landes and Posner, *supra* note 11, at 325.

<sup>39</sup> *Id.* at 326.

<sup>40</sup> *Id.* at 327.



preparing the book for publication,<sup>41</sup> and a variable cost, *i.e.*, the cost of producing each copy of the book.<sup>42</sup> The author will write the book if the expected revenue exceeds the cost of producing it.<sup>43</sup> The rationale for copyright, however, arises from the assumption that the variable cost of producing a book is the same for the author and any infringer.<sup>44</sup> Thus, for an author to invest time creating a new work, he must expect his total revenue less his cost of copies to exceed the fixed cost of writing the book. To the extent that revenues for an author are driven down by infringing copies, which can be sold for their variable cost because the infringer does not incur the author's fixed costs of writing, the incentive to produce new work is lost.<sup>45</sup> Copyright, by prohibiting unauthorized copying, solves the problem of marginal cost copies destroying the incentive to write.

Superficially, the economic explanation to this point would justify placing complete control of the work in the first author. The problem with that approach is that it will stifle the next author. As Landes and Posner suggest, the number of works produced might very well decrease if the level of protection is too high. All works contain elements that are copied from some other text.<sup>46</sup> If protection is too extensive, authors will have to engage in expensive searches, risk liability, or pay royalties to write.<sup>47</sup> If these costs are too high, authors may simply decide that the effort is not remunerative and quit.<sup>48</sup> Thus, for the optimal number of works to be produced, an economically rational law must provide the means for new material to be produced as well as provide protection to existing materials. The law would do so by limiting the scope of the copyright to the actual expression and not the ideas,<sup>49</sup> limiting the term of protection<sup>50</sup> and providing for some copying to be deemed fair use.<sup>51</sup>

Landes and Posner then make a startling assertion. Unlike Congress, the courts and most authorities on copyright who do not

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<sup>41</sup> *Id.* at 326-27.

<sup>42</sup> *Id.* at 327.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 328.

<sup>45</sup> *Id.* at 329.

<sup>46</sup> *Id.* at 332.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 347-53.

<sup>50</sup> *Id.* at 361-63.

<sup>51</sup> *Id.* at 357-61.

claim any success in finding an organizing principle for fair use,<sup>52</sup> Landes and Posner suggest, "[o]ur economic model . . . explains the major applications of the fair use principle."<sup>53</sup> Their fair use examples concern the effect of the use on the market for an original work, the cost of producing a new work and the transaction costs of securing rights to copy unexceptional parts of a prior writing in a new work. The clearest example they give is the "high-transaction-cost case."<sup>54</sup> If a writer wants to copy a small portion of a copyrighted work, the economic theory of copyright would permit the use because securing the necessary license would be too costly and the proposed use would not harm the market for the original work. "The copier here is neither a firm selling copies nor a potential purchaser of copies, so his projected use affects neither the supply of copies nor the demand for them."<sup>55</sup> Similarly, the general use of the ideas and sequencing of a prior work might be permitted if it is a productive use, rather than one that simply replaces the work from which the ideas are taken.<sup>56</sup>

The explanation of fair use for reviews, including those that reduce the market for the reviewed work, is more problematic than the prior general example. Landes and Posner justify use of copyrighted material in reviews because it is essentially a form of advertising for the work and thus, in general, increases the available market.<sup>57</sup> They recognize, however, that in individual cases the market for a particular work may be destroyed if the review is bad enough.<sup>58</sup>

Copyright law likewise permits parody because it functions as a form of criticism,<sup>59</sup> but Landes and Posner have a difficult time identifying the market function of this form of criticism and do not offer an explanation of what it is. Moreover, they face a sticky problem with parody's close cousin, burlesque. They argue that burlesque is an infringement because it operates as a substitute and thus reduces the revenues of the original.<sup>60</sup> It is very difficult to imagine, however, that *Abbott and Costello Meet Frankenstein* signifi-

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<sup>52</sup> See *supra* text accompanying notes 12 and 32-34.

<sup>53</sup> Landes and Posner, *supra* note 11, at 357.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 360.

<sup>57</sup> *Id.* at 358-59.

<sup>58</sup> *Id.* at 359 n.45. The loss is justified because, on balance, the information tends to increase the demand for copyrighted work. *Id.*

<sup>59</sup> *Id.* at 360.

<sup>60</sup> *Id.* at 359-60.

cantly affected the market for Mary Shelley's classic novel. Thus, the line between parody and burlesque is difficult to discern.

### III. ANALYSIS

The difficulty in conforming the economic theory of copyright and the case law may be more important than first suggested by the examples of criticism and parody. Although the economic theory of judicial decisions may be implicit, the decisions should reflect the outcomes predicted by the model.<sup>61</sup> The positive theory fails if it does not explain the results of judicial decision-making.<sup>62</sup>

The cases concerning unpublished writings raise a significant challenge to the economic explanation of fair use offered by Landes and Posner. First, most of the cases do not conform to the expected results suggested by Landes and Posner. Second, the two cases reaching the expected result are decided on grounds that do not conform with the expected rationales. In short, the economic model fails its most important tests.

#### A. Testing an Economic Model

The law and economics movement purports to be a scientific method for studying decision making, and as such it sets a high standard for itself in terms of verification. Under a scientific theory, as described by its advocates, the hypothesis that fair use promotes economic efficiency must survive the criticism that the economic theory fails to describe what judges do.<sup>63</sup> If the theory fails to predict judicial behavior, the hypothesis is disproved.

As an approach to legal interpretation, law and economics is an unstable combination of two positivist intellectual approaches. In positive economic analysis, the test of a descriptive or positive theory is its ability to survive tests designed to prove it wrong.<sup>64</sup> A

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<sup>61</sup> See R. POSNER, *supra* note 35, at 21. Posner states:

Although few judicial opinions contain explicit references to economic concepts, often the true grounds of legal decision are concealed rather than illuminated by the characteristic rhetoric of opinions . . . . It would not be surprising to find that legal doctrines rest on inarticulate gropings toward efficiency, especially when we bear in mind that many of those doctrines date back to the late eighteenth and nineteenth century, when a *laissez faire* ideology based on classical economics was the dominant ideology of the educated classes in society.

*Id.*

<sup>62</sup> For an analysis of the failure of law and economics to explain the law of fraud and privacy, see K. SCHEPPELE, *LEGAL SECRETS* 161-78, 248-65 (1988).

<sup>63</sup> See *infra* notes 68-71 and accompanying text.

<sup>64</sup> Hovenkamp, *Positivism in Law and Economics*, 78 CALIF. L. REV. 815, 817 (1990).

strong hypothesis survives repeated challenges to its predictive powers.<sup>65</sup> Legal positivism, likewise, attempts to describe the rules of a society as they exist. Modern legal positivists, however, do not claim to predict judicial behavior.<sup>66</sup> In an attempt to determine the underlying rules guiding decision makers, such as judges, the legal positivist may provide a historical explanation for the behavior but does not purport to predict the decision in the next hard case.<sup>67</sup> In this sense, these theories of economics and law make for strange positivist bedfellows: one attempts to be predictive while the other focuses upon historical interpretation.

Rather than resolve the unlikely marriage of the modern views of positive law and positive economics, the school of law and economics falls into a middle area. "The stated methodology of Chicago School law & economics is at once legal positivism and economic positivism."<sup>68</sup> The School takes from legal positivism the goal of defining the legal rules the decision makers are using. From economic positivism, it borrows the methodology of testing hypotheses.<sup>69</sup> The goal is to be "scientific" within a paradigm defined by a faith that legal behavior can be explained in economic terms.<sup>70</sup> Unlike other modern positivists, however, the advocates of law and economics claim success in terms of predictive outcomes. As Judge Posner explains, "[t]he object of scientific research—and the aspiration of economic analysis of law is to be scientific, whatever the achievements to date—is to increase our ability to predict and control our environment, in this case our social environment."<sup>71</sup>

### B. Predictions

The ability of a model to predict judicial behavior becomes, then, a measure of the success of the economic model. For the economic theory to serve as a predictor, it should describe how cases are decided based on the application of some basic economic assumptions. As applied to copyright, the economic theory suggests that protection depends on the need to provide incentives to write

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 819.

<sup>68</sup> *Id.* at 817.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 822.

<sup>71</sup> Posner, *The Future of Law and Economics: A Comment on Ellickson*, 65 CHI.-KENT L. REV. 57, 61 (1989).

original works.<sup>72</sup> If judges decide fair use questions using this incentives rationale, three factors should be particularly evident in the cases and serve as a means for testing the viability of the Posner and Landes claims.

First, fair use should support productive uses of unpublished materials. The use of the unpublished writings in biography or criticism, especially letters and diaries, is a productive one. That is, the second use is an extension that would not supplant the original document.<sup>73</sup> Reading a biography or particular literary criticism would not diminish the market for collections of the original writings. In fact, it may enhance it.<sup>74</sup> Similarly, evidence that the second work has had little effect on the market for the unpublished works would support a finding of fair use, and is consistent with a productive use.

Second, a court should find a fair use when the motive for writing the original work is not remunerative. The letters by Richard Wright to Margaret Walker, for example, conveyed his advice to her on dealing with editors, his trials with editors and other daily matters.<sup>75</sup> The need for an economic incentive to write these missives is not apparent.<sup>76</sup>

Third, a court should find a fair use when the amount of original writing used is small compared to the amount that is available. In the case of literary figures, unpublished letters, while substantively important, supplement a large body of published works and other sources, such as interviews, available to describe the copier's subject.<sup>77</sup> Thus, the use of the unpublished materials generally would not displace the subject's prior work.

The application of the fair use privilege, if it is consistent with the application of the Landes and Posner model, therefore, would favor limited productive use of unpublished materials when the amount used is small and the original purpose for writing the work is not remunerative. In contrast, if the copy amounted to a collection of the unpublished works, the original works would receive more

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<sup>72</sup> See *supra* text accompanying notes 34–60.

<sup>73</sup> See Fisher, *supra* note 11, at 1743; Leval, *supra* note 7, at 1111–16.

<sup>74</sup> See Landes and Posner, *supra* note 11, at 359.

<sup>75</sup> Wright v. Walker, 748 F. Supp. 105, 111 (S.D.N.Y. 1990).

<sup>76</sup> See Leval, *supra* note 7, at 1119 (“To conclude that documents created for purposes outside the concerns of copyright should receive more vigorous protection than the writings that copyright was conceived to protect is bizarre and contradictory”).

<sup>77</sup> See W. ZINSSER, *supra* note 6, at 14–16 (describing the use of interviews and travel as a means of developing an understanding of the subject of biography).

protection because the use is not as productive and would likely displace the publication by the authors or their heirs. If the unpublished work itself was prepared for publication, it would receive less protection than other forms of original writings. Thus, the application of the economic model of fair use, though not always protecting the copier, would favor biographers and critics.

### C. *The Unpublished Writings Cases*

Yet in a strange twist, the Supreme Court and the Second Circuit Court of Appeals have given authors (or more often their heirs) a nearly absolute veto on the use of unpublished writings. Three cases, *Salinger v. Random House, Inc.*,<sup>78</sup> *New Era Publications Int'l v. Henry Holt & Co.*,<sup>79</sup> and *Love v. Kwitny*,<sup>80</sup> are notably inconsistent with the economic model of fair use.

In *Salinger*, author J.D. Salinger successfully prevented the use, in a literary biography by Ian Hamilton, of unpublished letters to neighbors, friends, teachers and publishers.<sup>81</sup> Hamilton located the letters, without the assistance of Salinger, at various university libraries where their recipients had deposited them.<sup>82</sup> When Hamilton completed his biography, he sent a copy to Salinger.<sup>83</sup> In response, Salinger registered seventy-nine letters for copyright protection and instructed his lawyer to attempt to bar publication of the book until Hamilton deleted the unpublished letters.<sup>84</sup> In response to Salinger's objection, Hamilton closely paraphrased most of the letters, but two hundred words of direct quotation remained.<sup>85</sup> At trial, Salinger disavowed any intent to publish the letters during his lifetime, though the value of the letters was estimated at \$500,000.<sup>86</sup> The district court, however, found that the value of the letters would not be impaired by the publication of the biography.<sup>87</sup> Apart from any financial considerations, Salinger

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<sup>78</sup> 811 F.2d 90 (2d Cir. 1987). See *infra* notes 81-94 and accompanying text.

<sup>79</sup> 695 F. Supp. 1493 (S.D.N.Y.), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1988). See *infra* notes 95-102 and accompanying text.

<sup>80</sup> 706 F. Supp. 1123 (S.D.N.Y. 1990). See *infra* notes 103-09 and accompanying text.

<sup>81</sup> *Salinger*, 811 F.2d at 92-93.

<sup>82</sup> *Id.* at 93.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 99.

<sup>87</sup> *Id.*

wanted to maintain his privacy; as he explained to Hamilton, "he preferred not to have his biography written during his lifetime."<sup>88</sup>

Though these facts appear to offer a paradigmatic situation for the economic theory of fair use,<sup>89</sup> the Second Circuit Court of Appeals thought otherwise. In reversing the district court's finding of fair use, the court of appeals neglected or revised several of the economic factors. Though it found that the first factor, the scholarly use, favored Hamilton, it also noted that the biographer's right was limited to "copying facts."<sup>90</sup> Copying for accuracy or vividness potentially overstepped the allowance made for a scholarly use. Concerning the nature of the work, the court concluded that unpublished works "normally enjoy complete protection against copying any protected expression."<sup>91</sup> As to the substantiality of copying, the court counted as copies both the direct quotation and the close paraphrases, thus expanding the amount of material copied.<sup>92</sup> Finally, the court of appeals revised the lower court's determination that the biography would not impair the market for the original writings, noting that Salinger could change his mind concerning publication.<sup>93</sup> It also suggested that any impairment of the market for the letters weighed against the copying.<sup>94</sup> In sum, the decision did not support the economic model in any significant way.

In *New Era Publications Int'l v. Henry Holt Co.*, the Second Circuit Court of Appeals affirmed a decision denying an injunction but castigated the lower court's application of an economic model of fair use. In this case, the publishing company holding the rights to L. Ron Hubbard's writings sued to prevent the publication of a critical biography. Several letters and unpublished diaries were among the materials used by the biographer to demonstrate that

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<sup>88</sup> *Id.* at 92.

<sup>89</sup> First, the use was productive. Hamilton was attempting to write a critical biography of Salinger, not a reiteration of Salinger's prior work. Second, Salinger did not prepare the original work, mostly letters, for remuneration. Third, the amounts that Hamilton used in the final work were very small, especially after he went to the trouble of removing or paraphrasing most of Salinger's original writings.

<sup>90</sup> *Id.* at 96.

<sup>91</sup> *Id.* at 97.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 99.

<sup>94</sup> *Id.* "We do not share the District Judge's view that marketability of the letters will be totally unimpaired. To be sure, the book would not displace the market for the letters. . . . Yet some impairment of the market seems likely." *Id.* In a rather odd twist, the court then notes that the bad paraphrasing in the biography may detract from the value of the original work. If that is so, then the court's use of the close paraphrasing to establish substantiality appears contrived.

Hubbard's public statements about his background and beliefs were far different from his history and private ruminations.<sup>95</sup> The district court decision extensively reviewed each of the quotations from the unpublished materials and determined that most were used for a productive use of criticism.<sup>96</sup> Less clear are the motives of L. Ron Hubbard in producing the diaries and letters. Hubbard appeared to have a substantial interest in making money throughout his life, but many of the letters were unrelated to his published works. Like Salinger, Hubbard was a writer, and these letters did not enter into the body of his published work. The amount used by the infringer compared to the total of Hubbard's writings was small.<sup>97</sup> Finally, the district court analyzed the likely markets to be affected by publication of a critical biography and found no impact.<sup>98</sup> On balance, these facts again favored a finding of fair use according to the law and economics approach.

Nonetheless, the Second Circuit Court of Appeals, in its review of the district court decision, concluded that unpublished works were entitled to extraordinary protection and refused to accept the fine distinctions the district court offered. For example, the appellate court held that the first factor in the fair use analysis, the purpose of the use, did not require an analysis of the individual quotations to determine whether each was used for an appropriate purpose.<sup>99</sup> As to the second factor, the nature of the work, the court rejected any suggestion that the copier could expect a favorable resolution based on the use made of the copied material.<sup>100</sup> Finally, the appellate court rejected the lower court's careful distinctions concerning the market effect of publication.<sup>101</sup> Thus, the determination that some of the copied work was unpublished led the court to the conclusion that an infringement occurred. Only the copyright holder's delay in attempting to secure relief prevented the grant of an injunction.<sup>102</sup>

Likewise, the decision in *Love v. Kwitny*<sup>103</sup> does not demonstrate any strong economic rationale along the lines predicted by the

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<sup>95</sup> *New Era*, 695 F. Supp. 1493, 1498 (S.D.N.Y.), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1988).

<sup>96</sup> *Id.* at 1507-20.

<sup>97</sup> *Id.* at 1520-22.

<sup>98</sup> *Id.* at 1523.

<sup>99</sup> *New Era*, 873 F.2d 576, 583 (2d Cir. 1988).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 584-85.

<sup>103</sup> 706 F. Supp. 1123 (S.D.N.Y. 1990).



model. The copied work was a student project describing the author's observations as a reporter for the *New York Times* during the Shah's takeover of Iran in 1953. The author sent a copy of the work to Allen Dulles, and the copy became part of the collected papers of Dulles at Princeton University. Another writer used the paper as part of a chapter in his book criticizing the American media for its failure to expose Central Intelligence Agency activities.<sup>104</sup>

The book exhibited the basic elements of the economic model of fair use. First, the use of the work was productive. The infringer did not use the material to describe what occurred in Iran in 1953. Rather, he used the material to demonstrate the failure of the media to report information about CIA activities to which they had access. Second, the paper was not written for remuneration. The author did not attempt to publish it and made only vague claims about an intention to do so. Though the copier quoted a large portion of the original work, his critical use of the material further suggested a strong justification for allowing such use.

Following the decisions of the Second Circuit, the district court held that the use was an infringement. Though the use was scholarly, the court concluded that the copier could use the facts but not the manner in which the facts were conveyed.<sup>105</sup> Second, the court found that the unpublished nature of the work weighed heavily against fair use, even though its inclusion might be for the purpose of improving the accuracy of the new work and the paper was distributed to a significant audience.<sup>106</sup> The court rejected as well the suggestion that the works served different purposes, even though the court accepted the scholarly and critical use of the paper.<sup>107</sup> The amount used weighed heavily against the copier, especially because the copier appeared less than honest in his attempt to secure permission to quote from the work.<sup>108</sup> As to the market impact, the court again accepted the assertion that the author could change his mind and decide to publish the work.<sup>109</sup>

Unlike the prior examples, the outcome in *Harper and Row, Publishers v. Nation Enterprises* is consistent with the economic model.<sup>110</sup> In this case, the publisher sued to recover from the *Nation*

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<sup>104</sup> *Love*, 706 F. Supp. at 1125-28.

<sup>105</sup> *Id.* at 1132-33.

<sup>106</sup> *Id.* at 1134.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 1134-35.

<sup>109</sup> *Id.* at 1135.

<sup>110</sup> 471 U.S. 539 (1985).

magazine the loss of income caused by *Time* magazine's termination of a serialization contract. Before *Time*'s release of the serialization of the Gerald Ford memoirs, a *Nation* magazine editor received a stolen copy of the memoirs and used them to write an article describing some of Ford's impressions about Richard Nixon and events during Ford's administration. As a result of the scoop, *Time* canceled the serialization and refused to make a final payment on the contract. Based on the Court's holding that fair use was not a defense to the *Nation*'s actions, the publisher recovered the lost payment from the *Nation*.<sup>111</sup>

Unlike most unpublished materials cases, the law and economics fair use model supports the result in *Nation Enterprises*. First, the use was not productive. The *Nation* magazine article simply summarized the materials that *Time* intended to use. As the Court explained, the *Nation*'s editor "attempted no independent commentary, research or criticism."<sup>112</sup> Second, the author and publisher clearly prepared the original work for publication.<sup>113</sup> Third, the infringer's action posed a very real economic danger to the author's serialization rights.<sup>114</sup>

Even though the *Nation Enterprises* result conforms to the model, the Court relied on a number of other policies in its decision. The Court raised questions of privacy, creative control and bad faith on the part of the *Nation*'s editor.<sup>115</sup> Thus, the Court seemed compelled to buttress its argument with factors outside the economic paradigm.

Similarly, the decision in *Wright v. Warner Books, Inc.*<sup>116</sup> conforms to the economic model in finding that fair use is a defense to copying. In this case, Margaret Walker, an English professor, wrote a literary biography of Richard Wright. The book included quotations from several previously unpublished letters from Wright to Walker.<sup>117</sup> Walker used the letters to establish facts about her personal association with Wright.<sup>118</sup> Furthermore, there was no significant demonstration that the use would impact the market for Wright's works. The use of quotation and paraphrasing was very

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<sup>111</sup> *Id.* at 542-43.

<sup>112</sup> *Id.* at 543.

<sup>113</sup> *Id.* at 542.

<sup>114</sup> *Id.* at 543.

<sup>115</sup> *Id.* at 554-55, 560-69.

<sup>116</sup> 748 F. Supp. 105 (S.D.N.Y. 1990).

<sup>117</sup> *Id.* at 111.

<sup>118</sup> *Id.*

small, the copier did not use the creative portions of the materials and there was no evidence of harm to any potential market for the letters.<sup>119</sup>

Based on these facts, the court's allowance of the fair use defense appears consistent with the economic model. The use of the materials was productive. The copier took the original work and used it to detail her literary biography, not to replicate Wright's creative genius. The author did not write the original works with any apparent economic goal. The amounts used were minor. The market impact, if any, was small. The court, however, added that the copyright holder's "bad faith" enforcement against some, but not all, biographers also contributed to a finding of infringement.<sup>120</sup> It also discussed in detail the privacy concerns raised by the case. While the result is consistent with the model's predictions, the language of the decision fails to support the economic model.

In summary, the economic model predicts that the level of protection for unpublished works such as letters and diaries would be relatively low if the use is productive, the incentives to write the original work are not injured, and the amount of the original work used is small. The cases, however, do not support the conclusion that the courts have adopted an economic model to deal with unpublished works. In three of the five examples, the decision is either plainly inconsistent with the model or of doubtful applicability. In the two cases in which the model and the result are consistent, the courts' rationales raise significant doubts about the model's importance to the particular outcome.

#### IV. NORMATIVE AND POSITIVE CRITICISMS OF THE ECONOMIC MODEL

##### A. *The Limits of Normative Criticisms*

Normative criticisms of the economic model of copyright offer useful but incomplete explanations for the difference between prediction and result. These criticisms fall into three categories. First, the informational requirements of the model are overwhelming. Second, the legal economist's base assumption of maximizing value in setting rules does not result in predictable rules. Third, the model fails to account for the more complicated ethical structure of copy-

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<sup>119</sup> *Id.* at 112-13.

<sup>120</sup> *Id.* at 113.

right and fair use. Each criticism is telling in a different way, but only the third suggests a rationale that is inconsistent with the economic model as a positive description of copyright and fair use law. The third normative criticism also offers an explanation that is consistent with the way judges say they are deciding cases, and thus offers some promise for future model construction.

Judges are not likely to use an economic model if the information required to decide cases according to that model is not available. In the case of fair use, the information required is very great and unlikely to be available. As Professor Fisher explains, the judge in each case would have to identify all possible uses of the work, determine the gains and losses to society for each use, rank those uses and then divide infringing and fair uses by the relative loss or gain of each.<sup>121</sup> Fisher concludes, "[f]ew judges would be willing, when confronted with a copyright infringement case in which the defendant invoked the fair use defense, to attempt an analysis of the sort sketched [in his discussion]. Of those inclined to commence such a project, few would succeed."<sup>122</sup> The reasons are obvious: courts cannot marshal the necessary information the model requires.<sup>123</sup>

This first challenge to the economic model, however, does not address the possibility that judges may be making second-best attempts at economically rational decision making. Fisher himself suggests the possibility when he derives some general rules from his description of the economic model.<sup>124</sup> Courts may be making the same kinds of generalizations. The inconsistent results might be explained as problems to be expected when applying the model under less than ideal circumstances. Some judges have a better economic sense than others or different value preferences. Given enough decisions, the right economic decision should prevail. As a

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<sup>121</sup> Fisher, *supra* note 11, at 1705-17.

<sup>122</sup> *Id.* at 1739.

<sup>123</sup> *Id.* Fisher continues:

To ascertain the economically optimal package of entitlements for a given type of copyrighted work using this mode of analysis, the judge would need an extraordinary amount of information, much of it very hard to obtain. Even determining popular tastes for different sorts of intellectual products and their uses would be difficult. Gathering reliable data with regard to such crucial variables as the sensitivity of different types of artists to fluctuations in their anticipated incomes and the mutability of each of the relevant sets of preferences would probably be impossible.

*Id.*

<sup>124</sup> See *id.* at 1740-44.

normative criticism, one can complain that judges should not attempt the impossible. As a positive challenge, however, the criticism does not preclude the possibility that judges make second-best attempts.

The second criticism of an economic approach to copyright demonstrates that it is virtually impossible to adopt rules under either form of optimality used to measure economic efficiency. The first form of optimality, maximization of social welfare, rests on the assumption of one optimal point at which everyone is made no worse off. Following the rules for establishing a Pareto optimal universe, however, results in a system in which a decision cannot be made because there are many optimal distributions. One, therefore, must look for a factor other than maximizing social welfare to determine which set of rules to use.<sup>125</sup> Going outside the system, however, violates the assumption that one can decide cases wholly within an economic model.

The second form of optimality used to measure economic efficiency solves the indeterminacy problem by substituting wealth for social welfare. Thus, the system one would choose is that which maximizes society's wealth.<sup>126</sup> Two alternative problems are readily apparent. In the first alternative, this approach suffers from another form of indeterminacy. Manipulating the prices of goods by changing the rules would increase the output of the higher-valued items and decrease the output of the lower-valued ones. As the output changes, however, the prices would reflect the relative abundance of the items. As prices changed, new rules would have to be adopted to reflect the new maximizing rule. On and on the process would go, the rules always changing though the goal of wealth maximization remained the same.<sup>127</sup>

In the second alternative, the economic model may result in a stagnation of current values due to the endowment effects of copyright. The endowment effect is the economic reality that the owner of a right tends to set a higher selling price for a right than a nonowner. If the value of the right is set by the person who values it the most so as to maximize value, those who currently own rights are favored over those who do not.<sup>128</sup> Thus, the first set of rights would control over any later alternative, and the endowment effects would further distort a reappraisal of the alternative.

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<sup>125</sup> See Yen, *supra* note 7, at 540.

<sup>126</sup> See Landes and Posner, *supra* note 11, at 326.

<sup>127</sup> See Yen, *supra* note 7, at 544-55.

<sup>128</sup> *Id.* at 545.

Like the criticism concerning lack of information, the argument concerning indeterminacy of an economic model is essentially normative. It gives several reasons why judges would not want to adopt that particular approach, but it does not suggest that they do not adopt it. Indeed, though it is unlikely, indeterminacy may explain the chaotic results of the cases concerning unpublished writings. Economic values change and with them the results of the cases.

The changing results in the cases, however, probably cannot be explained by either the indeterminacy or endowment effects. One would expect some period of time to pass before the indeterminacy appears. These cases and their inconsistent results occurred in a short period. Likewise, the endowment effects would suggest a single result in the cases because the intentions of the holders should all be the same. The inconsistency again suggests that the economic model does not explain the outcomes.

Finally, Professor Yen points out that wealth maximization ignores a great deal of the ethical nature of values within a society. Society values many things besides wealth. "[I]f wealth maximization truly identifies the optimal social order, it must do so because a society which maximizes wealth necessarily observes all other values worth recognizing."<sup>129</sup> The *Salinger* case in particular, with its striking protection of privacy, bears out this concern. Once again, however, this argument suggests what courts should consider, not whether unseen economic forces are driving what they are doing. On the other hand, this normative criticism may provide a key to the positive puzzle.

#### B. Using the Normative Criticisms to Explain Fair Use

A positive model of fair use should attempt to predict outcomes. It may coincidentally also reflect the beliefs of the decision makers, but it need not. If, however, it fails to predict behavior and does not reflect the values of the decision makers, these failures suggest the need for a new model.

In the positivist view of the world, it would not matter if the economic theory and the courts' rationales did not coincide with one another. "One could claim that if the theory works to predict behavior, attitudes, or even legal decisions, then the correspondence

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<sup>129</sup> *Id.* at 542. Professor Hovenkamp makes a similar point when he notes that the law and economics school fails to account for the significantly more complicated value structure that motivates legislators. Hovenkamp, *supra* note 64, at 835-47.

between the conceptual framework of the analyst and that of the subject is irrelevant."<sup>130</sup> In copyright cases concerning unpublished writings, however, the economic model fails to describe the results about half of the time. In the other half, the courts' rationales generally reach beyond economic theory. As a result, the model as applied in this area is somewhat suspect as a positive explanation of the courts' decision making.

Because the model does not describe the results of these cases, one might then look at what the courts are saying. A better theory might attempt to integrate both what courts do and what they say they are doing.<sup>131</sup> In that same regard, the positive claims made by Landes and Posner for their copyright model pose some significant problems because the actors, judges, do not see the world through the same economically tinted lens.

As suggested by those who think decision making is more complicated than the economic model permits, the cases demonstrate that the courts consider several factors other than wealth maximization in making decisions concerning fair use. In this regard, one commentator suggests that the courts are imposing an unusual and value-laden hierarchy concerning the kinds of writings being addressed, their users and their users' motives.<sup>132</sup> The cases seem to support the notion that the courts do make some sort of decision about the ethical conduct of the parties. In the *Nation Enterprises* decision, for example, the Supreme Court repeatedly emphasized the bad faith of the *Nation's* editor in using materials he should have known were stolen.<sup>133</sup> In *Wright*, the court went through the economic analysis but then bolstered its opinion by noting the bad faith of Wright's widow in selectively prosecuting the defendant.<sup>134</sup> In *Salinger*, the court repeatedly emphasized the privacy concerns of J.D. Salinger.<sup>135</sup> While none of these factors are necessarily inconsistent with the view that the courts decide cases to maximize wealth, they support an alternative theory when they appear central to court decisions that do not follow the model.

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<sup>130</sup> K. SCHEPPELE, *supra* note 62, at 162.

<sup>131</sup> *Id.* ("If a theory both explains the phenomena and corresponds to the way in which the subjects of the theory view the world, then it might be claimed that, as between two theories that explain equally well, the one that also corresponds to the view of the subjects is better, on the view that theories that explain more are better than theories that explain less").

<sup>132</sup> See Conley, *supra* note 9, at 20-23.

<sup>133</sup> See *supra* text accompanying note 115.

<sup>134</sup> See *supra* text accompanying notes 116-20.

<sup>135</sup> See *supra* text accompanying notes 81-94.

The model also ignores the openly conflicting views of the inspiration for copyright law and fair use.<sup>136</sup> While some claim that fair use is a utilitarian device, others have found in copyright elements of natural law,<sup>137</sup> Hegelian allocation to facilitate use and the limited power of positive law to describe rights.<sup>138</sup> It is little wonder, then, that one finds in the decisions attempts to protect social utility, reward the author for his labors, protect the author's privacy and creative rights, and accord the law with custom.<sup>139</sup> The contrasting view that copyright promotes a single world view of wealth maximization is an interesting normative argument, but it does not comport with reality. Thus, the Landes and Posner theory of copyright fails as a positive explanation of copyright and fair use, at least in an increasingly important area of litigation, the treatment of unpublished factual writings.

#### CONCLUSION

While Landes and Posner apparently overstate their claim that fair use cases can be explained by their essentially utilitarian theory of copyright, their theory does offer an analytical tool for criticizing difficult cases concerning unpublished materials. Underlying the law and economics approach is a notion that fair use permits advances in knowledge. In contrast, the Second Circuit Court of Appeals' treatment of unpublished writings appears to frustrate that interest. Ian Hamilton's response to the court's decision in *Salinger* presents interesting anecdotal support. Instead of writing a critical biography of Salinger, Hamilton produced a largely autobiographical work describing his efforts to write about Salinger.<sup>140</sup> Thus, the *Salinger* example shows how excessive copyright protection may frustrate legitimate literary efforts. In effect, the advancement of learning is suppressed and the utilitarian goal frustrated. As a normative tool, then, the Landes and Posner model may provide academics and practitioners with another argument for attacking the broad protection afforded unpublished writings.

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<sup>136</sup> See Nance, *Forward: Owning Ideas*, 13 HARV. J.L. & PUB. POL'Y 757 (1990).

<sup>137</sup> Yen, *supra* note 7, at 522-39.

<sup>138</sup> Fisher, *supra* note 11, at 1691-92.

<sup>139</sup> See *id.* at 1686-91; Dratler, *supra* note 11, at 333-34.

<sup>140</sup> Perry, *supra* note 9, at A22, col. 4.